93-397

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue
and
DELONGS, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, AND
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. When a state imposes a statewide use tax upon *inter*state sales at a rate which, in more than 50% of the state's taxing jurisdictions, is higher than the sales tax rate on identical *intra*-state sales, is the resulting discrimination against interstate commerce constitutionally irrelevant merely because in the aggregate the state collects more sales taxes than use taxes?

2. Does *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), validate a state tax scheme which in numerous instances burdens interstate commerce more heavily than intrastate commerce? If so, is *General American* inconsistent with *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and should it be expressly overruled?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provisions and Statutes	2
Statement of the Case	3
Reasons For Granting the Writ	7
I. The Missouri Use Tax Discriminates Against Out-of-State Transactions and Therefore Violates the Commerce Clause	7
II. *General American* Does not Require — or Even Permit — the Result Reached by the Missouri Supreme Court; But if it Does, it Should be Overruled	13
Conclusion	17

TABLE OF AUTHORITIES

Page(s)

Cases Cited

American Modulars Corporation v. Lindley, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978)..... 12

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 9,13,15

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 11,12

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 7

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 11

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 7

Department of Revenue v. Warren Petroleum Corp., 119 N.E.2d 215 (Ill. 1954) 14

Don McCullagh, Inc. v. State, 93 N.W.2d 52 (Mich. 1958)..... 15

Fabick & Co. v. Schaffner, 492 S.W.2d 737 (Mo. 1973)..... 8

Freeman v. Hewitt, 329 U.S. 249 (1946) 7

General American Tank Car Corp. v. Day, 270 U.S. 367 (1926) .....*passim*

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 6,9,13,16

Henneford v. Silas Mason Co., 300 U.S. 577 (1937).... 15

Lane Construction Corp. v. Comptroller of the Treasury, 178 A.2d 904 (Md. 1962) 14

Maryland v. Louisiana, 451 U.S. 725 (1981).....7,10,15

National Can Corporation v. State of Washington, 715 P.2d 128 (Wash. 1986), *vacated sub nom.* Tyler Pipe Industries, Inc. v. Department of Revenue, 483 U.S. 232 (1987) 15

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 12

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 7

Phillips v. Oklahoma Tax Commission, 577 P.2d 1278 (Okla. 1978) 12

Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)..... 11

Other Authorities

United States Constitution,
Article I, Section 8, Clause 3 2

Missouri Revised Statutes (1992)

Section 144.020 2

Section 144.610 2,3

Section 144.748 3,4,6

Constitution of Missouri (1945, as amended)

Section 43(a) 3

Section 47(a) 3

28 U.S.C. § 1257(a)..... 2

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OPINIONS BELOW

The majority and dissenting opinions of the Missouri Supreme Court filed June 29, 1993, are not yet officially reported but are reproduced in Appendix A to this Petition at pages A-1 and A-25, respectively. The unreported Judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced in Appendix B at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court, en banc, was entered on June 29, 1993. No rehearing was sought. This petition was filed within ninety (90) days of the judgment. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3:

> "The Congress shall have the power . . . "To regulate commerce with foreign nations, and among the several states . . . ."

MISSOURI REVISED STATUTES (1992):

Section 144.020:

> **"Rate of tax.** - 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> > "(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged . . . ."

Section 144.610:

> **"Tax imposed, property subject, who liable.** - 1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property . . . in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020."

Section 144.748:

> **"Additional use tax . . .** - 1. In addition to the taxes imposed by section 144.610, there is hereby imposed an additional use tax in the amount of one and one-half percent upon all transactions which are subject to the taxes imposed under sections 144.600 to 144.745."

CONSTITUTION OF MISSOURI (1945, as amended):

> **Section 43(a).** . . . "For the purpose of providing additional monies to be expended and used by the conservation commission, department of conservation . . . an additional sales tax of one-eighth of one percent is hereby levied and imposed . . .; and an additional use tax of one-eighth of one percent is levied and imposed . . . ."
>
> **Section 47(a).** . . . "For the purpose of providing additional monies to be expended and used by the department of natural resources . . . an additional sales tax of one-tenth of one percent is hereby levied and imposed . . .; and an additional use tax of one-tenth of one percent is levied and imposed . . . ."

STATEMENT OF THE CASE

Missouri imposes a state-wide use tax of 5.725% on all goods purchased outside of Missouri but stored, used or consumed in Missouri. Mo. Rev. Stat. §§ 144.610, 144.748 (1992). The state also levies a state-wide sales tax of 4.225% but allows local governments the option of imposing additional local sales taxes. In 841 of the 1573 taxing jurisdictions in Missouri — or 53.5% — the aggregate sales tax imposed on goods purchased within the state is less than 5.725%. Therefore, in those 841 jurisdictions, a resident purchasing an item from a local merchant would

be taxed at a lesser rate than his neighbor who bought the identical item through the mail from a vendor in another state.[1]

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit corporation operating as a trade association comprised of individuals and organizations engaged in business in Missouri and elsewhere. It was stipulated that AIM's members pay Missouri sales and use taxes on purchases of property made within and without Missouri and that several of AIM's members also collect and remit Missouri use tax on sales made outside of Missouri to purchasers located within Missouri (Stip. ¶4). Petitioner Alumax Foils, Inc. is headquartered in St. Louis and likewise is subject to Missouri sales and use taxes. Alumax currently pays approximately $3,000 per month in Missouri use taxes (Stip. ¶5).[2]

Petitioners sued :he Missouri Director of Revenue in the Circuit Court of Cole County, Missouri, claiming that the state-wide additional 1.5% use tax violates, *inter alia*, the Commerce and Equal Protection Clauses of the United States Constitution because it discriminates against out-of-state sales by imposing a use tax at a greater rate than would be applicable to many in-state

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[1] The statutory scheme creates a state-wide sales tax of 4.225% and a state-wide use tax of 4.225%. The legislature, in § 144.748, mandated an additional use tax of 1.5% on all interstate sales but left it to local option whether to adopt a local sales tax. More than half the local jurisdictions have not adopted a local sales tax or have enacted one of less than 1.5%. Thus it is the uniform additional 1.5% use tax imposed by § 144.748 which creates the disparity between local and interstate sales and which is the target of petitioners' challenge in this case.

[2] Alumax Foils, Inc., is a subsidiary of Alumax Inc. It has no subsidiary corporations that are not wholly owned.

sales of identical items via the sales tax.[3] The Circuit Court of Cole County rejected the constitutional challenge and entered judgment for the defendant Director (A-35). On direct appeal, the Missouri Supreme Court affirmed (A-1), Chief Justice Robertson dissenting (A-25).

The majority opinion of the Supreme Court of Missouri acknowledged the stipulated fact that in a number of cities and counties the use tax rate is higher than the sales tax rate. The court ruled that any resulting discrimination against interstate commerce was constitutionally insignificant even though 26.5% of the state's population lives in counties where the use tax rate exceeds the sales tax rate, pointing out that only 6.86% of the intrastate sales were made in such counties (A-16-18). The court also emphasized that, because some counties had sales tax rates in excess of 5.725%, the overall amount of use tax collected state-wide is less than the aggregate sales tax collections (A-17).

The majority opinion placed heavy reliance on this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* said, in connection with a discussion of the Equal Protection Clause, that a taxing statute is not unconstitutional merely because it does not treat nonresidents and residents with "mathematical exactness." The Missouri court construed *General American* to permit the Missouri system of taxation "even though in some instances [it] may burden interstate commerce more heavily than intrastate commerce" (A-12). The majority attempted to distinguish later Commerce Clause cases on the ground that the taxes invalidated

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[3] Respondent Janette M. Lohman has succeeded Raymond T. Wagner as Director of Revenue. The other respondents intervened in the trial court in support of the constitutionality of the use tax. Respondents Delongs and the Associated General Contractors of Missouri argued that they would be at a "competitive disadvantage" if petitioners were successful in this action (First Amended Motion to Intervene, pp. 1,4).

there "imposed higher use taxes both on an individual basis and on an average statewide basis" (A-16). The court further held that even if those cases are not distinguishable, they are inconsistent with *General American* and that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional" (A-19 n.9).

The court below acknowledged that "[a]n exacting application of the dicta contained in *Halliburton* [*Oil Well Cementing Co. v. Reily*, 373 U.S. 64] and certain cases following it would require invalidating §144.748" (A-16). But finding that the Commerce Clause "does not require identical treatment of all taxpayers," the majority upheld the taxing scheme because overall "it imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the local discrepancies do not rise to a level of quality or quantity that would demand a different result" (A-19).[4]

Chief Justice Robertson dissented (A-25). He rejected the majority's statistical analysis and argued that there is no *de minimis* exception to the Commerce Clause. He criticized on numerous grounds the majority's reliance on the equal protection discussion in the 1926 *General American* case and observed that the result reached there was at odds with numerous more recent Commerce Clause holdings. He concluded his dissent with these comments:

> "With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional" (A-34).

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[4] The court also rejected petitioners' federal equal protection and due process claims and several state constitutional challenges.

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI USE TAX DISCRIMINATES AGAINST OUT-OF-STATE TRANSACTIONS AND THEREFORE VIOLATES THE COMMERCE CLAUSE.

The stipulated facts show that in more than half the state's taxing jurisdictions the use tax rate levied on interstate transactions is higher than the sales tax rate applicable to intrastate sales. This is because every interstate sale is subject to a 4.225% state-wide use tax plus a mandatory 1.5% additional use tax, whereas intrastate sales are subject to a 4.225% state-wide sales tax and may be, but are not necessarily, subject to a local sales tax.

The Commerce Clause of the United States Constitution prohibits state actions "which may fairly be deemed to have the effect of impeding the free flow of trade between the states." *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946). In the field of taxation, a tax on interstate activities may be sustained only when it has a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

A taxing statute discriminates against interstate commerce if it "provid[es] a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Simply and fundamentally stated, the "dormant" Commerce Clause requires equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. at 759.

Here, Missouri's taxing scheme clearly smacks of the kind of economic protectionism that the Commerce Clause proscribes.

In more than 50% of the state's subdivisions, a consumer who buys a washing machine at his local appliance store will pay a sales tax of less than 5.725%, whereas if he ordered the exact same model out of the J. C. Penney catalog, the use tax would be 5.725%. The local merchant thus obviously has a competitive advantage when seeking the consumer's business. Even if, as the Missouri Supreme Court said, only 26.5% of Missouri's population lives in areas where the use tax rate exceeds the sales tax rate, the resulting tax discrepancy can hardly be characterized as having an insubstantial effect on interstate commerce.[5] Indeed, the trial court found, based on the parties' stipulation, that the additional mandatory 1.5% use tax will generate more than $58 million in additional revenue in 1993, based on interstate sales of more than $3.8 billion (A-37).

The Missouri Supreme Court did not analyze the discriminatory aspect of individual transactions, nor did it bother to mention the extent of the effect of this discriminatory scheme either on out-of-state sellers of goods or on Missouri purchasers, such as petitioners, who must pay unduly high use taxes in more than half the taxing localities.[6] Instead, the court focused on the

---

[5]The additional use tax is imposed on the purchaser, based on his place of residence, whereas the local sales tax is levied on the seller based on the rate applicable where his place of business is located. See *Fabick & Co. v. Schaffner*, 492 S.W. 2d 737 (Mo. 1973). Thus the fact that 26.5% of the population lives in areas with a local sales tax rate lower than 1.5% is more significant in this case than the fact that only 6.86% of *intra*state sales are made in those areas.

[6]The record showed, for example, that Petitioner Alumax is headquartered in St. Louis, where a use tax of 5.725% is applicable to equipment purchases from out-of-state. Alumax buys some products from a vendor in St. Francois County, Missouri, where the sales tax rate is only 4.975% (Stip. ¶5). Hence, foreign competitors of the St. Francois vendor are disadvantaged by the local use tax, and Alumax is encouraged to deal with the Missouri supplier and penalized if it decides to buy from that supplier's out-of-state competition.

fact that certain political subdivisions have adopted local sales taxes at a rate in excess of 1.5%, thus bringing the total sales tax in those areas to a rate higher than the 5.725% use tax rate. Because the localities adopting a greater than 1.5% local sales tax include some of the more populous areas of the state (such as Kansas City), the state can expect to receive approximately $100 million more in sales taxes than in use taxes in a given year, according to the court (A-17). This circumstance was deemed controlling by the majority:

> ". . . [I]t is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis." *Id.*

The Missouri Supreme Court's mathematical exercise misses the constitutional point. The issue is not whether there is a little or a lot of discrimination against interstate commerce. Nor is it determinative whether the effect on state revenue of the admitted discrimination against interstate commerce is offset in other parts of the state by higher tax rates on intrastate sales. Rather, the question is whether out-of-state sales are treated unequally and whether petitioners, as taxpayers, are being discouraged from buying interstate goods and taxed disproportionately when they do. "A State may not tax *a transaction or incident* more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (emphasis added).

This Court has been vigilant in its inspection of state use tax legislation because a use tax is a particularly effective vehicle for favoring local business over foreign competition. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court struck down a Louisiana use tax. Although the Louisiana scheme imposed sales and use taxes at the same rate, in some transactions certain components of out-of-state products were subject to the use tax, whereas those components were not taxed in intrastate sales. The taxing scheme also exempted articles

bought second-hand within Louisiana, while taxing under the use tax similar articles purchased in the same fashion in another state.

Even though the state court had described the discrepancy in the tax burden as "incidental," this Court looked at the way in which the statute operated and held it unconstitutional:

> "The conclusion is inescapable: Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70.

So the pivotal issue is not the overall effect of the taxing scheme on the state's treasury (*i.e.*, whether more sales taxes or use taxes are collected), but whether out-of-state purchases are treated equally with purchases from in-state merchants. In the present case, an Illinois mail-order house which sells a computer to a resident of Dexter or Kennett, Missouri, for example, will find itself at a competitive disadvantage because its transaction will be taxed at 5.725%, whereas the local Apple distributor will be able to charge a sales tax of less than 5.725%. Yet the Missouri Supreme Court says that this discrimination against interstate transactions is immaterial because the customer of a Kansas merchant buying his goods through the mail in Kansas City may be paying a use tax that is less than the comparable sales tax rate. That is of scant solace to the Illinois mail-order house and its Missouri customers, and no case supports the Missouri Supreme Court's conclusion that the local favoritism that hinders that merchant's ability to sell goods in Missouri is constitutionally insignificant or otherwise defensible.

This Court held in *Maryland v. Louisiana*, 451 U.S. 725 (1981), that the "common thread" running through the sales tax/use tax cases is "the equality of treatment between local and interstate commerce." *Id.* at 759. That case was an original proceeding decided by this Court on the pleadings. The taxing

state (once again, Louisiana) sought further hearings to establish that the extent of the discrimination was minimal. This Court rejected that argument and declared the statute unconstitutional as a matter of law, stating as follows:

> "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the tax is before concluding that it unconstitutionally discriminates." *Id.* at 759-60.

This approach was recently reaffirmed in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"); *accord*, *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992) ("The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce").

The Missouri Supreme Court's attempt to trivialize the discriminatory effect of the state-wide additional use tax is also at odds with *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), where this Court rejected a "*de minimis*" argument based on a substantially smaller percentage of overall sales volume than is present here. In *Bacchus*, an excise tax on wholesale liquor sales exempted certain unique alcoholic beverages produced only by the taxing state. Even though the exempted sales counted for no more than .7739% of total liquor sales (*id.* at 268 n.9), the Court found prohibited discrimination against out-of-state producers. The Court said:

> "Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Conse-

quently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the state, there is a discriminatory effect." *Id.* at 271.

See also New Energy Co of Indiana v. Limbach, 486 U.S. 269, 276 (1988) ("Our cases indicate . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown").

The *Bacchus* Court also noted that the discriminatory exemption was enacted to protect local producers, thus intensifying the Commerce Clause concerns. So too here, the record showed — and the Director admitted — that the Missouri state-wide additional use tax of 1.5% was imposed to protect Missouri merchants who, prior to that time, were required to collect combined local and state sales taxes at a higher overall rate than the applicable state use tax. (See Respondents' Br., Mo. Sup. Ct. No. 75089, p. 22.)

The Missouri Supreme Court's opinion in this case is also in conflict with at least two decisions by other state supreme courts which have remained faithful to this Court's jurisprudence by striking offending use tax provisions very similar to those at issue here. *See American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978) (Ohio system, whereby some counties imposed sales and use taxes and other did not, impermissibly discriminated against interstate commerce); *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978) (where state imposed use tax of 4% and sales tax of 2%, with local option to add additional 2%, scheme violated Commerce Clause).

The Missouri General Assembly has flouted the Commerce Clause in an effort to aid Missouri business and has swelled the state's coffers at the expense of foreign vendors. The Missouri Supreme Court, desirous of enhancing state revenues, abdicated

its constitutional responsibility and failed to apply governing Commerce Clause principles as articulated by this Court. In order to discourage such behavior and to dampen the enthusiasm of other states for similarly offensive taxing schemes, this Court's intervention is needed.

II. *GENERAL AMERICAN* DOES NOT REQUIRE — OR EVEN PERMIT — THE RESULT REACHED BY THE MISSOURI SUPREME COURT; BUT IF IT DOES, IT SHOULD BE OVERRULED.

The Missouri Supreme Court paid little heed to *Halliburton* and the other use tax cases from this Court but instead relied almost completely on the 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). *General American* was not a sales/use tax case but rather involved an excise tax on the right to do business in the state. The tax was challenged as clearly designed to force nonresidents to become domesticated.

The majority of the Missouri Supreme Court hailed the approach taken in *General American* as "more flexible" and "more practical" (A-13). The problem with *General American*, however, is that the portion of that opinion which the Missouri Supreme Court found so alluring was contained in an analysis of the equal protection issue, rather than the Commerce Clause question. Indeed, *General American* was decided against the background of the "now rejected notion that only 'direct' burdens on interstate commerce were disapproved." *Armco, Inc.*, 467 U.S. at 643 n.7. *General American* has never been mentioned in any of this Court's subsequent Commerce Clause decisions and, in fact, has not been cited by this Court in any context in almost 50 years.

In *General American*, Louisiana had adopted a tax of "25 mills on the dollar 'of the assessed value of all rolling stock of nonresident . . . corporations, having no domicile in this state . . . .'" 270 U.S. at 370. The tax was imposed not on a transaction but

on a foreign corporation's property in Louisiana and was in lieu of the local tax assessed by the parishes. The nonresident corporation, though, could avoid the excise tax by "becoming domiciled in a parish" and paying the local tax. Because the corporation could opt out of the state tax without changing its actual business operations, the taxpayer in *General American* did not attack the Louisiana statute on the grounds that it burdened an interstate transaction more than a local transaction. Rather, the taxpayer argued that the statute was a "thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in this state." *Id.* at 372.

It was in this context that this Court considered whether the tax on the nonresident's property was "substantially" greater than the tax on residents. The Court upheld the Louisiana tax because the difference between the taxes on the property of resident and nonresident corporations was, on the record before the Court, *de minimis*. Absent a showing of discrimination "in some substantial way," the Court refused to infer that the Louisiana tax was really an attempt "to require the nonresident corporation to take out a license to do business within the state." *Id.* In other words, contrary to the interpretation placed on *General American* by the Missouri Supreme Court, that case did not hold that taxing an interstate transaction more than an intrastate transaction was permissible if the discrimination was small or localized. Rather, the *General American* Court merely refused to infer that a small or localized extra burden on the nonresident corporation was necessarily an unconstitutional attempt to force that corporation to become domiciled in the state.

Even though *General American* is therefore off the mark and is primarily an equal protection, not a Commerce Clause, case, it has become — as it was in this case — a rallying point for state courts desirous of sustaining local taxing measures which assist and protect in-state merchants. *See, e.g., Department of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954); *Lane*

Construction Corp. v. Comptroller of the Treasury, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 52 (Mich. 1958); *National Can Corporation v. State of Washington*, 715 P.2d 128 (Wash. 1986), *vacated sub nom. Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987).

The Missouri Supreme Court ruled that discrimination against out-of-state transactions due to lower sales tax rates in some counties can be justified by *higher* sales tax rates in other parts of the state. As noted, that holding draws no support from *General American*; more importantly, it is contrary to the ruling and the rationale of *Armco, Inc.*, 467 U.S. 638. *Armco* involved a gross receipts tax levied on persons selling at wholesale in the state, but it exempted local manufacturers. The state tried to defend the taxing scheme by pointing out that manufacturers were assessed a tax on their output at a *higher* rate than the gross receipts tax. The Court rejected the argument that the two taxes were "compensating" or "complementary" and struck down the gross receipts tax. Likewise here, Missouri cannot defend its discriminatory treatment of out-of-state vendors in 53% of the state by pointing to transactions involving other vendors in other parts of Missouri. Taxing programs that are truly "complementary" will pass Commerce Clause scrutiny only when the burden on a foreign merchant is equal to that of his local counterpart. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937); *Maryland v. Louisiana*, 451 U.S. at 759.[7]

The court below readily acknowledged that "the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations" (A-16) and conceded that "an

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[7] A taxing system could scarcely be described and defended as "complementary" or "compensating" if, for example, it imposed a use tax of 10% on all sales into Missouri by Kansas merchants but offset the burden of that levy by making all sales from Illinois tax-free. Yet such a scheme would be operationally akin to the current Missouri arrangement.

exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating §144.748" (*Id.*). But the court refused to follow that course, suggesting that *Halliburton* and its progeny were "to some extent" distinguishable (A-16). It then went on to hold that even if *Halliburton, et al.*, are not distinguishable "they are nonetheless inconsistent with *General American*," and finding itself torn between two supposedly conflicting lines of authority, the court said that "in the face of inconsistent precedent from the United States Supreme Court, we will presume our state's statutes to be constitutional" (A-19 n.9). The court used the "flexibility" it found in *General American* to tip the constitutional scales because: "Every indulgence must be made in favor of the legislature's handiwork" (*Id.*).

The fallacy of the majority's reasoning was cogently capsulized in Chief Justice Robertson's dissent, where he demonstrated that *General American* is inapposite for at least four different reasons (A-26-30) and that the relevant Commerce Clause cases require invalidation of the Missouri tax (A-30-34). Nevertheless, the majority opinion catapults *General American* into prominence as a Commerce Clause precedent, a role for which it was not designed and which it ill serves. This Court should grant certiorari to halt the increasing propensity of state courts to use this 67-year old equal protection decision to override prevailing Commerce Clause jurisprudence.

CONCLUSION

For the reasons stated, petitioners request the Court to grant a Writ of Certiorari to review the judgment of the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 75089

[Filed: June 29, 1993]

ASSOCIATED INDUSTRIES OF MISSOURI,
and ALUMAX FOILS, INC.,
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vs.

DIRECTOR OF REVENUE and
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Respondents.

APPEAL FROM THE
CIRCUIT COURT OF COLE COUNTY
Honorable James F. McHenry

Appellants challenge the constitutionality of § 144.748, RSMo. Supp. 1991.[1] The statute imposes a flat 1.5 percent use tax for the privilege of storing, using or consuming tangible personal property in Missouri that was purchased outside the state. Appellants seek a declaration that the tax violates the commerce, due process, and equal protection clauses of the United States Constitution and the due process, equal protection and uniformity clauses of the Missouri Constitution and an injunction permanently enjoining enforcement of the statute. The trial court denied both declaratory and injunctive relief. We have exclusive appellate jurisdiction under article V, § 3 of the Missouri Constitution and affirm the decision of the trial court.

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[1] With the exception of this provision, all statutory references are to RSMo 1986, unless otherwise indicated.

I.

Appellant Associated Industries of Missouri ("AIM") is a not-for-profit corporation comprised of persons, firms, partnerships and corporations engaged in business or industry in Missouri. AIM's members pay Missouri sales and use taxes on purchases of tangible personal property purchased inside and outside of the state.

Appellant Alumax Foils, Inc., (Alumax") is a Delaware corporation headquartered in St. Louis, Missouri. It is a member of AIM. Alumax manufactures and sells foil products inside and outside of Missouri. Some of its purchases in Missouri are subject to local sales taxes at rates less that [sic] 1.5 percent.

Respondent Raymond T. Wagoner, Jr., was the duly appointed and qualified director of revenue, who in such capacity was charged with administering § 144.748.

Respondent intervenors include: Delong's, Inc., a steel fabricating company located in Jefferson City; the City of Blue Springs, a municipality located in Jackson County; Gary Markenson, a taxpayer residing in Jefferson City; the Missouri Association of Counties, a not-for-profit corporation representing the interests of 112 Missouri counties; the Missouri Municipal League, a benevolent corporation representing the interests of 540 municipalities; and, the Associated General Contractors of Missouri, a benevolent corporation whose members include contractors and other with similar business interests. They all allege that they will suffer harm should appellants prevail.

Respondent intervenors argue that appellants lack standing to challenge the constitutionality of § 144.748. The parties, however, have stipulated that appellants are subject to payment of the use tax under § 144.748 and that the Appellants pay sales taxes in geographical areas where the aggregate sales tax is less than the aggregate use tax. Accordingly, § 144.748 affects appellants' business interests as they choose between in-state and out-of-state purchase of goods, sometimes with differing sales and use tax burdens. This is sufficient to confer standing on appellants, Alumax and AIM.[2]

II

Before considering the constitutionality of § 144.748, it is necessary to set forth the comprehensive sales and use tax scheme in Missouri. Generally, a sales tax is imposed upon the sale of an item of tangible personal property within the state. A use tax is a one-time tax attached to the use, consumption or storage of an item of tangible personal property, otherwise exempt from sales tax because it was purchased from a seller outside of the state. Use taxes are often referred to as "complementary" to sales taxes. In addition to raising revenue, use taxes attempt to equalize the competitive position of intrastate and interstate commerce by assuring that Missouri residents who purchase from either source bear equivalent tax burdens.

Section 144.020 imposes a statewide sales tax of 4.225 percent on the sales price of tangible personal property sold in Missouri. Section 144.610 imposes a statewide use tax of 4.225 percent on the sales price of tangible personal property sold outside of Missouri but stored, used, or consumed in Missouri.

Other provisions authorize, but do not require, county and municipal governments to impose various local sales taxes on the sale of tangible personal property sold within their jurisdiction. *See, e.g.*, §§ 66.600 to 66.635, 67.500 to 67.545, 92.440 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745. Prior to the enactment of § 144.748, these permissive sales tax statutes resulted in an aggregate sales tax rate higher

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[2] In *Mo. Outdoor Adv. v. Hwys. & Transp. Comn.*, 826 S.W.2d 342 (Mo banc 1992), we held that associations have standings to present the common interests of their members.

than 4.225 percent in the vast majority of counties and municipalities in the state, while the use tax on similar transactions made outside the state remained at 4.225 percent.

In response, the General Assembly enacted § 144.748, also known as the "additional use tax". The statute imposes an additional flat use tax at the rate of 1.5 percent on the sales price of tangible personal property purchased outside the state. While the tax is imposed and collected by the state, it is distributed back to the counties in accordance with a formula provided in the statute.

As a result of the flat use tax rate, the aggregate use tax imposed upon all interstate transactions is now 5.725 percent of the sales price. The aggregate sales tax rate on an identical intrastate transaction, however, may be higher or lower than 5.725 percent, depending upon the rate that each county and municipal government has imposed under the permissive sales tax provisions.

Generally, most taxable sales are subject to a higher aggregate sales tax rate than the aggregate use tax rate. The following cities, however, are among those areas where the aggregate sales tax rate falls below 5.725 percent: Dexter in Stoddard County, Clifton Hill in Randolph County; New Cambria in Macon County, Napolean in Lafayette County; Bixby and Glover, both in Iron County; Brandsville in Howell County; Stanberry in Gentry County; Kennett and Malden, both in Dunklin County; Winston in Daviess County; Gordonville in Cape Girardeau County; Monett in Barry County; and Farber in Audrain County. Consequently, consumers such as appellants who purchase, for example, a copy machine in Dexter, Missouri, pay less in sales taxes than they would have paid in use taxes had they purchased the copy machine outside the state. It is this disparity that appellants contest.

In the case at bar, the parties have stipulated to figures that reflect taxable sales made in Missouri in the calendar year of 1990. Respondents argue that based on these figures, had § 144.748 been enacted at that time, the use tax would have been less burdensome on interstate commerce than the complementary sales tax on intrastate sales when considered on a statewide basis. The record reveals that in 1990, the use tax would have imposed approximately $100,000,000 less in overall tax liability than would have been generated had the sales been made instate and subject to sales taxes. Based upon these stipulated facts, 93.14 percent of all taxable sales made in Missouri were subject to an aggregate sales tax rate of 5.725 percent or higher. Of those sales, 55.32 percent were subject to an aggregate sales tax rate in excess of 5.725 percent, with some aggregate sales tax rates as high as 7.5 percent. However, 6.86 percent of the taxable intrastate sales were subject to a sales tax rate less than 5.725 percent, which would have been the statewide aggregate use tax rate had § 144.748 been enacted.[3]

Thus, the core issue before the Court is whether a state use tax may impose a greater burden than the various sales taxes in specific localities, if on a statewide basis the use tax imposes a lesser overall burden than do all the various sales taxes. We hold that it may where, as here, the state displayed no purpose to

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[3]It is also possible to examine other comparisons. The number of counties and municipalities in which the aggregate use tax rate exceeds the aggregate sales tax rate is 841 out of 1,573, or approximately 53.5 percent. Also, 26.5 percent of Missouri's population live in counties where the use tax rate exceeds the sales tax rate. Neither of these percentages make adjustment for the fact that certain counties that have sales tax rates lower than the use tax rates contain municipalities with sales tax rates that are higher than the use tax rates. Hence, these percentages are most likely overstated for use here. At any rate, however, such comparisons do not reflect commercial activity and the impact upon that activity of sales or use tax burdens. Accordingly, the most helpful focus in an examination of whether discrimination exists against commerce is the burden on actual sales.

discriminate against interstate commerce and has substantially avoided doing so.[4]

III

Article I, § 8, cl. 3, of the United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." Although the clause is an express grant of power, it also has been understood to imply a "negative sweep" that limits the states' power to interfere with interstate commerce. *Quill Corp. v. North Dakota*, __ U.S. __, 119 L.Ed.2d 91, 104 (1992). This 'negative' aspect of the commerce clause has long been held to prohibit states from discriminating against interstate commerce but does not necessarily require "identical treatment of all taxpayers engaged in such commerce." *Tatarowicz and Mims-Velarde, An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 925 (1986).

The United States Supreme Court has oscillated in its interpretation on the commerce clause over the years, particularly as that clause concerns limitations on state taxation powers. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 420 (1946); *see Quill*, __ U.S. __, 119 L.Ed.2d at 104. In the earliest decisions, the Supreme Court declared that "no State has the right to lay a tax on interstate commerce in any form." *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888); *see also Brown v. Maryland*, 12 Wheat 419, 6 L.Ed. 678 (1827). Later cases interpreted the commerce clause less stringently by distinguishing between direct and indirect burdens on interstate commerce. Direct burdens were prohibited while indirect burdens were generally permitted. *Quill*, __ U.S. __. 119 L.Ed.2d at 104 *citing Sanford v. Poe*, 69

[4] Our decision is limited to the facts in this record. Sales tax rates may change or purchasing patterns may vary. Whether the statute's application to future situations remains within constitutional bounds must be determined in accordance with facts as they occur.

F. 546 (6th Cir. 1895), *aff'd sub nom Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897). The wavering doctrinal lines of the Court's decisions reflect the tension between two competing concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Goldberg v. Sweet*, 488 U.S. 252 (1989).[5]

The currently accepted commerce clause approach is articulated in *Complete Auto Transit, Inc. v. Brady*. There, the Court attempted to reconcile the concept of unrestricted access to the national market with each state's authority to collect its fair share of revenues from interstate commercial activity. 430 U.S. 274, 285 (1977). *Complete Auto* emphasizes looking past "the formal language of the tax statute [to] its practical effect." *Id.* at 279. Under the *Complete Auto* analysis, a state tax on interstate commerce will be sustained against a commerce clause challenge so long as the tax "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. Our review of § 144.748 focuses on the third prong of the *Complete Auto* test: Does the statute discriminate against interstate commerce?

The issue of whether complementary use and sales tax schemes are discriminatory under the commerce clause has been the

[5] The murky nature of the precedents on this issue was noted by this commonly cited satirical restatement of the law of interstate commerce:

> Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempts to regulate commerce too much such regulation will be unconstitutional. Caveat: This Restatement is not intended to express any opinion as to how much regulation is too much.

W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 349 (4th ed. 1975).

subject of a substantial amount of litigation. When states first began to adopt sales taxes, they feared that local merchants would lose business when prospective buyers purchased outside the state to avoid local sales tax liability. States also feared the loss of revenue they would incur as a result of the diversion to nontax sellers from other states. *Hellerstein, Complementary Taxes as a Defense to Unconstitutional Tax Discrimination,* 39 Tax Law. 405, 407 (1986). Complementary use taxes developed in response to concerns about the troublesome gap created by the adoption of sales taxes.

When considered in isolation, use taxes are discriminatory, as they are intended apply only to goods acquired out of state. *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 69 (1963). Because they are usually paired with corresponding sales taxes, however, the Supreme Court has upheld such tax schemes. The Court has found that in the context of the overall tax structure such statutes may properly impose on the out-of-state purchase of goods an equivalent burden to that imposed on an in-state purchase. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937).

At issue in *Henneford* was a Washington use tax imposed upon the "privilege of using within [the taxing] state any article of tangible personal property" that was not otherwise subject to a tax equal to or greater than the use tax. 300 U.S. at 581. The Court stated:

> Equality is the theme that runs through all the sections of the statute... When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into [the state]. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation, the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

Id. at 584. The critical question, the Court explained, was not whether a distinction existed "in form", but whether "there was any substantial discrimination in fact." *Id.* at 585, *quoting Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932).

The tax scheme in the instant case is slightly different from the typical complementary sales/use tax scheme sanctioned in *Henneford.* Here, we have a use tax that treats interstate commerce more favorably than intrastate commerce on an overall basis. Because local sales taxes are permissive in Missouri, however, the comparison between the use and sales tax varies from locality to locality. As previously stated, had § 144.748 been enacted in 1990, this would have resulted in 55.32% of instate sales being subject to a higher sales tax rate, 36.82% of instate sales being subject to an equal sales tax rate, but 6.86% of instate sales being subject to a lower sales tax rate than the use tax rate.

IV

The standard to be applied for determining whether discrimination exists, the third prong of the *Complete Auto* test, has not been stated with consistency. It is difficult from reading the various decisions to determine whether their outcomes are the result of differing factual contexts or shifting ideology. Generally, *Halliburton,* 373 U.S. 64, 70-71 is the primary case implying a rather rigid dollar-for-dollar equivalence between intrastate and interstate taxation. *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932), and *General American Tank Car Corp. v. Day,* 270 U.S. 367 (1925), however, are the leading cases appearing to allow for a more practical approach that does not require "math-

ematical exactness." A brief review of these and other representative cases is in order.

A.

In *Halliburton,* the Court considered a Louisiana use tax imposed on specialized equipment purchases and assembled outside the state. Although the sales and use tax rates were identical, they were applied to different tax bases: labor and ship overhead costs were excluded from the sales tax base but were included in the use tax base. The Court found that including these costs in the use tax base had the discriminatory effect of imposing a greater tax on goods manufactured outside of Louisiana than on goods manufactured within the state. The Court declared the tax unconstitutional and stated:

> [E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. In this case, the "incidental discrepancy" — the labor and shop overhead for the units in dispute — amounts to $1,547109.70. The use tax rate in Louisiana is 2% and has risen in some States to 4%. The resulting tax inequality is clearly substantial.

Halliburton, 373 U.S. at 70-1.[6]

Some state courts have used *Halliburton* to strike their own use tax provisions. The Supreme Court of Oklahoma relied on

[6] *See also Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984) (New York tax credit for products shipped from New York held unconstitutionally discriminatory against interstate commerce); *Maryland v. Louisiana,* 451 U.S. 725 (1981) (Louisiana "first use tax" imposed on imported natural gas to "compensate" for Louisiana severance tax held unconstitutional because the tax was not based on complementary events and because certain exemptions and credits favored local interests); *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977) (New York stock-transfer tax held unconstitutional because it discriminated against interstate commerce by reducing taxes on in-state transfers but not out-of-state transfers.)

Halliburton when it struck down a use tax similar to the use tax at issue here. The use tax rate in *Phillips v. Oklahoma Tax Comm'n,* 577 P.2d 1278 (Ok. 1978), was increased from 2 percent to 4 percent of the sales price of tangible personal property used or consumed in Oklahoma. The statewide sales tax remained at 2 percent.

The state argued that the inequality was rectified by the existence of optional and non-uniform municipal sales taxes. The Oklahoma Court rejected this argument outright, citing *Halliburton* as requiring that *"equality* for the purposes of competition and the flow of commerce *is measured in dollars and cents and not legal abstractions."* *Id.* at 1284. It then found that the $12,000,000 that would be raised by the increased use tax was "clearly substantial" and thereby discriminatory. *Id.* at 1284.

The Supreme Court of Ohio also relied on *Halliburton* to strike an Ohio use tax statute. In *American Modulars Corp. v. Lindley,* 376 N.E.2d 575, 576 (1978), individual counties were authorized, but not required, tc levy an additional one-half percent sales and use tax on property purchased or used within their boundaries.[7] The ultimate result of the Ohio tax scheme was that all property used or purchased in any particular county would be taxed at an equivalent rate. However, a purchaser could choose to buy an item in another county without the permissive tax, thereby obtaining an intrastate tax advantage when compared to an outstate purchase delivered to the taxpayer's home county.

The Ohio Court found that this result provided a direct commercial advantage to local businesses that would impede the free flow of trade between the states. *Id.* at 577, *citing Freeman*

[7] In addition to the permissive county sales and use taxes, the state imposed a four percent tax on the sale or use of tangible personal property purchased or consumed in Ohio.

v. Hewitt, 329 U.S. 249 (1946). It concluded that the statute discriminated "against out-of-state acquisitions as invidiously as it would if it subjected those purchases to an unfavorable tax basis." *Id., citing Halliburton*, 373 U.S. at 70.

The California Supreme Court also cited *Halliburton* in *Woosley v. State*, 838 P.2d 758 (Ca. 1992), when it struck down a use tax. The use tax in *Woosley* imposed a higher tax on vehicles originally sold outside California than the tax charged on similar vehicles first sold within the state. Although the tax rate was the same for both, the tax bases differed. The tax base for vehicles originally purchased outside the state was determined by the actual purchase price. The tax base for vehicles purchased within California was determined by the manufacturer's suggested base price.

The Court found that the practice resulted in the imposition of significantly higher license fees for vehicles purchased outside the state than for those first sold in California. The discrepancy was caused, in part, by the inclusion of factory-installed accessories and optional equipment in the actual purchase price, which were excluded from the suggested base price for vehicles originally purchased in California. *Id.* at 762-3.

The only justification offered by the state for the discrimination was administrative convenience. The court found that even if such concern could, under some circumstances, justify an obstruction to interstate commerce, the showing made by the state was insufficient because the state had previously utilized nondiscriminatory alternatives. *Id.* at 771.

B.

Another line of authority, however, permits complementary state taxes on interstate commerce "in lieu of" local taxes even though in some instances they may burden interstate commerce more heavily than intrastate commerce. *General American*, 270

U.S. 367 (1925); *Gregg Dyeing Co.*, 286 U.S. 472 (1932); *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1958); *Illinois Cent. R.R. v. Minnesota*, 309 U.S. 157 (1940); *Department of Revenue v. Warren Petroleum Corp.*, 119 N.E.2d 215 (Ill. 1954). These cases give the commerce clause a more flexible interpretation that allows for a more practical standard.

General American is the seminal case of the "in lieu of" doctrine. There, the Supreme Court sustained a tax on the rolling stock of out-of-state firms even though the parties stipulated that there was a disparity between the rate the out-of-state firms were charged and the rate an instate firm would have had to pay. *Id.* at 374. The out-of-state firms were subject to a flat rate of 25 mills per dollar of assessed value statewide, while instate firms were subject to higher or lower rates in various parishes. *Id.*

Despite the fact that local taxes in some parishes were below the flat tax rate imposed on interstate commerce, the Court sustained the tax because the Appellants failed to show that the flat rate of 25 mills fell below the general average of taxes on residents collectively statewide. *Id.* The Court stated:

> "[W]here the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary." *Id.* at 373.

Specifically, appellants had argued that the average local tax statewide was at the rate of twenty-one mills, four mills less than

the interstate tax at issue. Although noting that this had not been proven, the Court went on to state that it would not hold that:

> A four mills variation in one year not shown to be a necessary or continuing result of the scheme of taxation adopted, would be an unconstitutional discrimination; for in such a scheme of complementary tax statutes, however fairly devised, it would be impossible to provide in advance against occasional inequalities as great as that here complained of. *Id.*

In *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), the Court followed the same theme expressed in *General American Tank*, stating:

> We regard the substance rather than the form, and the controlling test is formed in the operation and effect of the statute as applied and enforced by the state. *Id.* at 476.

The Court further noted that:

> Discrimination like interstate commerce itself is a practical conception. We must deal in this matter, as in others, with substantial distinction, and real injury. *Id.* at 481.

The more practical approach indicated in *General American* and *Gregg Dyeing Co.* also has been relied upon by state courts in upholding use taxes where the overall tax scheme was deemed fair but worked some inequalities in certain circumstances. For example, in *Lane Construction Corp. v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962), the Court of Appeals of Maryland sustained a use tax that used a different tax base than the base used in determining the sales tax. Originally both sales and use taxes were based on the actual purchase price. Thus, goods purchased outside the state were taxed on their purchase price no matter how long after the purchase they were first used, stored or consumed in Maryland. *Id.* at 905.

In order to soften the impact of the use tax in situations where goods first became taxable in Maryland after long use elsewhere, the legislature provided that in computing the assessable basis, 10 percent of the purchase price be deducted for each full year of use outside the state. *Id.* at 905. Appellant argued that the formula imposed higher taxes on out-of-state goods.

The Court found:

> The fact that, in a given circumstance, the tax produced by the statutory formula of the value of an item imported, and the amount at which a comparable item could then be bought secondhand in Maryland — if one were available — [did] not coincide precisely, [did] not of itself make the tax unconstitutional."

The Court upheld the tax and explained:

> The Supreme Court in viewing the practical operation of use taxes attacked as in violation of the commerce clause, has looked to see if substantial discrimination against "foreigners" in plan or effect was present. [citations omitted]. The Court has not required that mathematical equality be given to out-of-state taxpayers or products, as long as such equality was reasonably attempted and somewhat closely achieved.

Id. at 907, *citing Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182; *Southern Pac. Co. v. Galagher*, 306 U.S. 167, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Gregg Dyeing Co. v. Query*, 286 U.S. 472; *General American Tank Car Corp. v. Day*, 270 U.S. 367; Hartman, State Taxation of Interstate Commerce, p. 163.

The Supreme Court of Michigan also adopted this reasoning in rejecting a commerce clause challenge based upon sales and use tax disparities between vehicle sales made for leasing intrastate and vehicle sales made for leasing interstate. *Don McCullagh,*

Inc. v. State, 93 N.W.2d 252, 257 (Mich. 1958) (appeal dismissed for lack of substantial federal question). The Court stated:

> [T]he Michigan legislature has acted accordingly to work out a fair and just system. Mechanically a perfect result may not be obtained in all instances. In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan. It is conceivable, however, that under the same sort of transaction as is here involved such condition might well be reversed. It is questionable if any tax law could be devised that would result in absolute equality under all circumstances.

Id. The Court then concluded that despite a few disparities, the tax was constitutional.

V

In deciding the present case, we acknowledge that the Missouri scheme of state and local sales and use taxes does not provide for an equal burden in all situations. Approximately 6.86% of instate sales in 1990 were made in localities where the interstate use tax rate would have been higher than the intrastate sales tax rate had § 144.748 been in effect. An exacting application of the dicta contained in *Halliburton* and certain cases following it would require invalidating § 144.748. We do not, however, believe that this is the appropriate course to follow for a number of reasons.

Halliburton, Maryland v. Louisiana, Westinghouse and *Boston Stock Exchange*, to some extent, can be distinguished. In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis. In no case was the use tax ever less than the sales tax. Whether the discrimination against interstate

commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax.[8]

In the present situation, this is not so. The use tax enacted by § 144.748 was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce. The stipulated facts indicate that for 1990, the use tax at issue would have resulted in approximately $100,000,000 less in overall tax liability than the corresponding sales taxes. When combined with the fact that 93.14% of the 1990 sales would have resulted in use taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis.

Moreover, the formalistic and exacting approach found in the dicta of the above cases seems to have been abandoned in the two most recent Supreme Court commerce clause decisions: *Trinova Corp. v. Michigan Treas. Dept.*, 498 U.S. __, 112 L.Ed.2d 884 (1991), and *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1912 (1992). Citing *Mobil Oil Corp. v. Comm. of Taxes of Vt.*, 445 U.S. 425 (1980), which had recognized the "conflicting precedents' of the past, *Trinova* stated that:

> We seek to avoid formalism and to rely upon a "consistent rational method of inquiry [focusing on] the practical effect of a challenged tax."

Id. at 904. In *Quill*, it was noted that "*Complete Auto* emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect.'" *Id.* at 1912. Interestingly, Judge Benton has just commented on the new emphasis of "practical

[8] The *Woosley* case also can be distinguished in this manner. *American Modulars* is suspect in its reliance on *Freeman*, which was overruled by *Complete Auto*. In *Phillips*, there was apparently no actual showing by the state that the tax was not discriminatory, although the state argued that in theory.

analysis" of "economic realities" in tax cases litigated under the commerce clause in his concurring opinion in *Bi Go Markets, Inc.* and *Wetterau, Inc. v. Morton*, 843 S.W.2d 916, 921 (Mo. banc 1992).

Under a "practical analysis" or "practical effect" test, § 144.748 passes scrutiny. In a state where a permissive system of local sales tax is allowed, the adoption of a statewide complementary use tax that results in a dollar for dollar match is most likely impossible. The Missouri legislature appears to have prudently set the use tax rate established by 144.748 at a level that taxes most transactions at a lower rate than the sales tax rate. On a statewide basis "interstate commerce", as such, is not discriminated against. While in certain localities the use tax may exceed the sales tax, and while individual purchasers may chose [sic] to take advantage of these discrepancies on occasion, we must recall that while the commerce clause protects "interstate commerce", it does not require identical treatment of all taxpayers. In short, we do not find that appellants have established a discrimination that produces the type of "real injury" required by *Gregg Dyeing Co.* to invalidate a tax.

Appellants have suggested that the tax more properly could have been excepted from sales occurring in localities with rates of sales taxes below 1.5%. The state might also have required that the use tax mirror the permissive local sales tax. Neither option, however, would guarantee a better result. *American Modulars* illustrates that even these types of statutes are subject to criticism, as residents of one county may travel to another for tax advantage purchases. Depending upon the actual tax rate s, demographics, and purchasing patterns, they might even result in greater discrepancies.

The legislature chose, instead, to enact a uniform but relatively low use tax rate that on a statewide basis compensates for any local discrepancy. So long as mathematical exactness is not

required, this is a legislative and not a judicial area of discretion into which we should neither speculate nor venture. As stated in *Trinova:*

> [w]e have always declined to undertake the essentially legislative task of establishing a single constitutionally mandated method of taxation.

Id. at 913, citing *Goldberg v. Sweet*, 488 U.S. 252 (1989).

We find that the tax scheme in the present case does not discriminate against interstate commerce in purpose or practical effect. It imposes a lesser tax burden on interstate commerce than it does on intrastate commerce and the local discrepancies do not rise to a level of quality or quantity that would demand a different result. *General American*[9] and the Supreme Court cases following it allow the states practical latitude in designing systems of complementary taxes. Section 144.748 is within these bounds.

VI

Appellants also maintain that § 144.748 violates the due process and equal protection clauses of the United States Constitution and the due process, equality and uniformity clauses of the Missouri Constitution. The due process claims of the federal and state constitutions both require a minimum connection between the state and the person, property or transaction it seeks to tax, and that the income attributed to the state for tax purposes be

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[9]To the extent *Halliburton, Maryland v. Louisiana, Westinghouse* and *Boston Stock Exchange* are not distinguishable, they are nonetheless inconsistent with *General American*. In the face of inconsistent precedent from the United States Supreme Court, we will presume our state statutes to be constitutional. Accordingly, § 144.748 will be "constitutional until the contrary is shown. Every indulgence must be made in favor of the legislature's handiwork." *Associated Industries v. State Tax Commission*, 722 S.W.2d 916, 918 (Mo. banc 1987).

rationally related to the values of the taxing case. *Quill*, __ U.S. __, 119 L.Ed.2d at 102; *Air Evac EMS, Inc. v. Director of Revenue*, 779 S.W.2d 573 (Mo. 1989). The first and fourth prongs of the *Complete Auto* test satisfy this requirement, as they demand more than the due process requirement of "minimum contacts" for commerce clause purposes. *Trinova*, __ U.S. __, 112 L.Ed.2d at 904; *Quill*, __ U.S. __, 119 L.Ed.2d at 107 and n.7. We find no basis in the record before us to support a challenge to § 144.748 on this basis.

Appellants' attack on § 144.748 under the equal protection clause of the federal constitution and the uniformity clause of the Missouri Constitution also fails. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. IV, § 1. Missouri's uniformity clause embodies a similar concept. It provides, in relevant part, "[t]axes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the the [sic] tax." Mo. Const. art. X, § 3.

The validity of a state tax statute under the equal protection clause is determined under the rational basis standard. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983). Under this test, a statute will be sustained if the state legislature reasonably could have concluded that the challenged classification would promote a legitimate state purpose. *Id.* Missouri's uniformity clause uses a similar standard of reasonableness as described in *State v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949), where the Court stated:

> There is no precise yardstick as to reasonableness of classification and the rule of equality of necessity often tends to practical inequalities. Taxation is not an exact science and tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be "palpably arbitrary."

In the present case, we find the state's choice of a uniform use tax rate is rationally related to its legitimate goals of avoiding discrimination against interstate commerce and trimming administrative costs;[10] and the classification of interstate and intrastate commerce — the former being taxed on the purchase of a product and the latter being taxed on the use of a product in the state — is neither arbitrary or capricious and satisfies the equal protection clause and Missouri's uniformity clause. *Southwestern Bell Telephone v. Morris*, 345 S.W.2d 62 (Mo. banc 1961).

We also reject appellants' contentions that the enactment and implementation § 144.748 violate Mo. Const. art. X, §§ 1 and 10(a). Article X, § 1, authorizes the General Assembly to exercise taxing power for "state purposes." It also authorizes county and other political subdivisions to exercise taxing power under the power granted to them by the General Assembly for "county, municipal and other corporate purposes." Article X, § 10(a), specifically prohibits the General Assembly from imposing "taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes."

Appellants allege that § 144.748 violates these provisions because it is a state tax imposed for local purposes. While we agree that § 144.748 is a state tax, we do not agree that it was imposed for local purposes. Although local county and municipal taxes caused the initial imbalance between the sales and use taxes, § 144.748 was enacted for the "state purpose" of equalizing the burden between interstate commerce and intrastate commerce. The state has a legitimate interest in preventing the loss of business that Missouri merchants would suffer as pro-

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[10] Although administrative convenience is rarely, if ever a legitimate state purpose under the commerce clause, it does suffice for equal protection purposes. *General American*, 270 U.S. at 372.

spective buyers purchased outside the state to avoid the additional local sales taxes and a legitimate interest in preventing the loss of revenue as a result of the diversion. *Trinova*, 493 U.S. __, 112 L.Ed.2d at 912 (1991).

By finding § 144.748 is a tax imposed by the state for a "state purpose," appellants' argument that the statute violates art. X, § 22 becomes moot. This provision, one part of what is commonly referred to as the Hancock Amendment, requires voter approval before any tax may be levied by a county or other political subdivision. It states, in relevant part:

> (a). Counties and other political subdivision are hereby prohibited from levying any tax, license or fees, not authorized by law, charter for self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charger when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

Because § 144.748 was enacted by the state for state purposes, Mo. Const. art. X, § 22, is wholly inapplicable.

Appellants make a similar argument that § 144.748 violates Mo. Const. art X, § 16, which requires voter approval of a state tax when it causes the revenue limits specified in art. X, § 18, to be exceeded. Section 18 provides, in relevant part:

> (a). There is hereby established a limit on the total amount of taxes which may be imposed by the general assembly in any fiscal year on the taxpayers of this state. Effective with the fiscal year 1981-1982, and for each fiscal year thereafter, the general assembly shall not impose taxes of any kind, which together with all other revenues of the state, federal funds excluded, exceed the revenue limit established in this section. The revenue limit shall be calculated for each fiscal year and shall be equal to the product of the ratio of total state revenues in fiscal year 1980-1981 divided by the personal income of Missouri in calender [sic] 1979 multiplied by the personal income of Missouri in either the calander [sic] year prior to the year in which appropriations for the fiscal year for which the calculation is being made, or the average of personal income of Missouri in the three previous calender [sic] years, whichever is greater.

We find the record totally void of any evidence supporting appellants' contention and thereby reject this argument.

Finally, appellants allege that § 144.748 violates Mo. Const. art. IV, § 28, which governs treasury withdrawals of state funds. Section 28 provides, in relevant part:

> No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the proper purpose as directed by the general assembly of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

Appellants contend that § 144.748 violates this section of the constitution because the statute remits a certain portion of the collected tax to each locality without an appropriation by law.

We do not find Mo. Const. art IV, § 28, applicable to the present case. It applies only to *state* funds deposited in the state treasury. Instead, we find that Mo. Const. art IV, § 15, is the applicable provision. It provides:

> The state treasurer shall be custodian of all state funds and funds received from the United States government. The department of revenue shall take custody of and invest

> nonstate funds as defined herein, and other moneys authorized to be held by the department of revenue... All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be promptly credited to the fund provided by law for that type of money. . . As used in this section, the term 'nonstate funds' shall include all taxes and fees imposed by political subdivisions and collected by the department of revenue; *all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions;* and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue.

The revenue collected by § 144.748 constitutes "nonstate funds." It is a tax imposed by the state, collected by the department of revenue, and distributed by the department of revenue to political subdivisions. Thus, there is no violation of Mo. Const. art. IV, § 28.

VII

Accordingly, we hold that the uniform tax rate imposed by § 144.748 is not unconstitutional. The judgment of the trial court is affirmed.

/s/ William Ray Price, Jr., Judge

Covington, Holstein, Thomas, Limbaugh, JJ., and Ahrens, Sp.J., concur; Robertson, C.J., dissents in separate opinion filed. Benton, J., not sitting.

DISSENTING OPINION

There is a single issue in this case: Whether a statewide use tax that places a higher tax burden on out-of-state purchases than is imposed by the sales tax on sales within Missouri violates the Commerce Clause of the United States Constitution. This question becomes all the more important when one considers that the use tax imposed by Missouri is higher in half of the taxing jurisdictions than is the sales tax. Elevating the cynic's conclusion about bureaucratic inefficiency to constitutional heights, the majority hold that the use tax scheme under scrutiny here is "close enough for government work." I respectfully dissent.

The case comes on cross-motions for summary judgment founded on the parties' stipulations of fact. Sales made in Missouri are subject to a statewide sales tax of 4.225%. Local taxing jurisdictions may also impose additional local sales taxes. The amount of local sales taxes imposed by local governments throughout Missouri is as high as an additional 3.5%, for a total tax of 7.725%.

Goods purchased outside of Missouri, but stored, used or consumed in Missouri are subject to a statewide use tax of 4.225%. The General Assembly, however, made no provision for offsetting local use taxes. As a result, instate sales were often subject to a higher overall sales tax than the use tax required for purchases of goods from other states. To remedy this competitive disadvantage for Missouri sellers, the legislature authorized an additional statewide use tax of 1.5%, making the aggregate use tax rate 5.725%, effective July 1, 1992.

The parties have stipulated that of the 1,573 taxing jurisdictions in Missouri, 841 (53.5%) of them have local sales taxes of less than 1.5%. Thus, in more than half of the taxing jurisdictions, the total use tax imposed on goods bought outside of Missouri is greater than the aggregate sales tax imposed on goods bought within the state. The State seeks to downplay this

obvious disparity by arguing that those 841 taxing jurisdictions account for only 6.86% of the taxable sales in Missouri and only 2.76% of the sales taxes collected in the state.

The State's use of these figures in misleading and, I respectfully submit, the majority's reliance on these figures is incorrect.

This case is an attack on the *use* tax; it is, therefore, irrelevant what percent of *instate* sales are made in those jurisdictions with local sales tax rates below 1.5%. Even if a "de minimis" exception to the Commerce Clause exists, and it does not, the relevant figure is the percentage of the total *out-of-state* purchases that are made by residents of these jurisdictions. Only this number would provide a true reading as to the amount of interstate commerce actually affected by the disparity between the aggregate use tax and the aggregate sales tax in more than half the state.

Unfortunately, the record provides no basis from which to calculate that number. The record does disclose, however, that approximately 26% of Missouri's population resides in these 841 taxing jurisdictions. The State concedes that the additional use tax is a burden on interstate commerce. Undaunted, the State argues that the additional use tax is not unconstitutional under the Commerce Clause because of the overall "de minimis" amount of discrimination that results in "practical operation". This argument is tantamount to a conclusion that 53.5% of the local taxing jurisdictions, and the 26% of the state's population that resides there, are constitutionally insignificant. I disagree.

The majority succumbs to this "close enough is good enough" theory, holding that "[w]hile in certain localities the use tax may exceed the sales tax" it is nonetheless not invalid under the Commerce Clause because it "does not discriminate against interstate commerce in purpose or practical effect." Maj. op. at 19, 20. The majority relies exclusively on *General American Tank Car Co. v. Day*, 270 U.S. 367 (1926), for the proposition

that the Commerce Clause does not forbid a state to tax the use of goods purchased out-of-state at a higher rate than the sale of goods instate.

In *General American,* Louisiana had a statewide, ad valorem tax on all property located within the state. Each parish and municipality also imposed additional, local ad valorem taxes on the same property. The state constitution, however, exempted nonresident railroads from these local property taxes. Therefore, the state passed an additional statewide ad valorem tax on all "rolling stock" located in Louisiana operated by non-domiciliary corporations. This created a situation in which non-domiciliary railroads had to choose between: (1) declaring residency in Louisiana and paying the lesser of the state-local combined ad valorem taxes, or (2) remaining a nonresident and paying the greater state-state combined property taxes. The parties stipulated that there were some, unspecified locales in the state where the state-local combination was less than the state-state combination. Though there was no evidence of the specific rates in any specific location, the state asserted that the statewide average local rate was equal to the additional state tax, thus making the average state-local burden the same as the state-state burden.

The taxpayer in *General American* challenged the additional statewide tax as unconstitutional under two theories — the Commerce Clause and the equal protection/due process clauses. It argued that the average statewide state-local burden was 4-mill less than the state-state burden and, therefore, the tax was "a thinly disguised attempt to compel nonresidents doing interstate business in Louisiana to declare a domicile in the state" in contravention of the Commerce Clause. The Court rejected the Commerce Clause challenge, stating:

> [I]t is obvious . . . that the tax in question is imposed on property of nonresidents in lieu of the local tax assessed in the several parishes of the state on property of persons or

> corporations domiciled there, and the nonresident may *either pay the state tax* assessed under [the state-state scheme] *or, at his option,* by becoming domiciled in a parish, *pay instead of it the local taxes* assessed [there].

Id. at 372. [Emphasis added.] This was the extent of the Court's Commerce Clause analysis in *General American.*

The remainder of the Court's decision in *General American,* including the portions upon which the majority in the present case bases its Commerce Clause holding, dealt exclusively with the taxpayers' challenge under the equal protection/due process clauses. The Court rejected these challenges, stating:

> *In determining whether there is a denial of equal protection* of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it s complementary.

Id. at 373 (*quoted at* Maj. op. at 15, in Section IV, which begins on page 10 and which details the "standard to be applied for determining whether discrimination [against interstate commerce] exists"). [Emphasis added.] The Supreme Court, speaking in dicta, extended its equal protection holding "even assuming" that the taxpayer's assertion of a 4-mill variance was correct:

> In the absence of a purpose to discriminate disclosed by the legislation itself we are not prepared to say that a 4 mills variation *in one year not shown to be a necessary and continuing result of the scheme of taxation* adopted would be an unconstitutional discrimination; for in such a scheme of complementary tax statutes however fairly devised it would be impossible to provide in advance against occasional inequalities as great as that here complained of.

Id. at 373-74. [Emphasis added.] The Court made clear, however, that "the record does not support the appellant's contention" of a variance. *Id.* at 374.

With respect, I believe *General American* is not controlling for at least four reasons. First, the majority relies on the due process and equal protection analysis in *General American* to support its conclusion that the Missouri additional use tax does not violate the Commerce Clause. The United States Supreme Court recently warned against confusing these two analyses.

> We have sometimes states that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . Due Process requirement[s]." *Trinova Corp. v. Michigan Dept. of Treasury,* 498 U.S. __, __, 111 S.Ct. 818, 828, 112 L.Ed.2d 884 (1991). Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: a tax may be consistent with Due Process and yet unduly burden interstate commerce. *See, e.g., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

Quill Corp. v. North Dakota, 112 S.Ct. 1904, 1914 n. 7 (1992). I believe the majority has confused Commerce Clause analysis with due process/equal protection analysis here.

Second, *General American* does not deal with a compensatory tax scheme such as the sales/use taxes in the present case. Rather, it deals with an ad valorem tax and considers how a state may tax the instate property of nonresidents where its local taxing authorities are prohibited from doing so by its own constitution.

Third, *General American* contains an abbreviated, and now highly suspect, Commerce Clause analysis. The Court held that the tax did not violate the Commerce Clause because the tax-

payer could "choose" the local taxes simply by declaring residence there. *General American*, 270 U.S. at 372. I do not believe such a justification for burdening interstate commerce would now pass constitutional muster.

> We find no authority for the . . . proposition advanced here that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business. Our cases suggest the contrary.

Kraft General Foods v. Iowa, 112 S.Ct. 2365, 2370 (1992) (*citing Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406 (1984) (discriminatory tax exemption struck on Commerce Clause grounds); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (use tax struck on commerce grounds for violating "strict rule of equality").

Fourth, the *General American* Court viewed the variation between instate/out-state tax burdens as "an occasional inequalit[y]" that had occurred "one year" due to discrepancies in application "impossible" to avoid. The Court specifically distinguished these variances from ones that are "a necessary and continuing result of the scheme of taxation." Such a conclusion is in sharp contradistinction to the present case, where the additional use tax — by virtue of the very "local option" sales taxes it ostensibly seeks to offset — must necessarily impose a continuing unconstitutional burden upon interstate commerce in that half of the state that has not elected to levy a 1.5% or higher local sales tax.

In its reliance on *General American*, the majority ignores a substantial line of authority reviewing the constitutionality of sales/use tax schemes under the Commerce Clause.

The United States Supreme Court's first detailed Commerce Clause analysis of a sales/use tax scheme is in *Henneford v. Silas*

Mason Co., 300 U.S. 577 (1937). There, the State of Washington sought to compensate for the damage done to the competitive abilities of is instate sellers by the state's 2% sales tax by imposing a 2% tax on the "use" of goods in Washington that were bought out-of-state. The Court upheld this statutory scheme, stating:

> *Equality* is the theme that runs through all the sections of the statute. . . . When the account is made up, the *stranger from afar is subject to no greater burdens* as a consequence of ownership than the dweller within the gates. . . . Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. *In each situation the burden borne by the owner is balanced by an equal burden where the share is strictly local.*

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), involved a similar compensatory scheme of taxation. The state supreme court ignored certain inequalities in the taxation scheme and upheld the taxes on the grounds that those inequalities were merely "incidental." The United States Supreme Court expressly rejected Louisiana's creation of a "de minimis" (close enough for government work) exception to the Commerce Clause.

> The conclusion is inescapable: *equal treatment* for instate and out-of-state taxpayers similarly situated is the *condition precedent* for a valid use tax on goods imported from out-of-state.

Id. at 70. The Court applied a strict rule of equality to its measure of "equal treatment." "[E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Id.* Because the Louisiana tax imposed

a greater burden on out-of-state goods than on local sales, the Court struck down the Louisiana statutory taxes as violative of "the *strict rule* of equality adopted in [*Henneford*]." *Id.* at 73. [Emphasis added.]

Unlike *General American*, which has been cited only twice by the United States Supreme Court in the sixty-seven years since it was written, *see Gregg Dyeing Co. v. Query*, 286 U.S. 472, 482 (1932) (citing *General American* for its due process analysis only); *Charleston Federal Savings & Loan Ass'n.*, 324 U.S. 182, 190 (1945) (same), *Henneford* and *Halliburton* have become principal mainstays of the Court's Commerce Clause jurisprudence. *See, e.g., Tyler Pipe*, 483 U.S. at 245-46 (*citing Henneford* and *Halliburton* for the principle that "equal treatment" is the constitutional prerequisite for a valid use tax under the Commerce Clause); *Williams v. Vermont*, 472 U.S. 14, 23 (1985) (same); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) (same).

Through its Commerce Clause cases, the Court has repeatedly and expressly rejected attempts to justify facially discriminatory taxes on the grounds that the discrimination was merely "de minimis." After holding the system of credits and exemptions allowed under Louisiana's ostensibly neutral "first use" tax to be unconstitutional, the Court struck down the tax and rejected a plea to remand for a hearing to determine the extent of the actual discrimination against interstate commerce, stating that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760.

In *Westinghouse Electric*, the New York taxing authorities tried to salvage a facially-discriminatory tax on the grounds that the discrimination was "de minimis." The Court states that "the extent of the discrimination does not affect our analysis," because "the Court need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Westinghouse Electric*, 466 U.S. at 407, n. 13.

Similarly, in *Bacchus Imports, Ltd. v. Dias*, 488 U.S. 263 (1984), the Court refused to look the other way while Hawaii exempted from its 20% excise tax on wholesale liquor sales two varieties of tropical wines produced on the islands. Rejecting the state's argument that the discrimination was "de minimis" because the sale of these local wines was less than 1% of the total liquor sales, the Court stated that "[i]t is well-settled the '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 269. The Court struck the entire forty-five million dollar tax, not just the exemption, on the basis of the state's discrimination in under one percent of sales.

"The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. at 759. *See also Tyler Pipe*, 483 U.S. at 243 (same); *Boston Stock Exchange, v. State Tax Comm'n.*, 429 U.S. 318, 331 (1977) (same). Thus a compensatory tax must, in actuality, be compensating for something. *Maryland v. Louisiana*, 451 U.S. at 758 ("first-use" tax struck because it did not compensate for a burden placed local goods).

No better summary of the relevant law is possible than that given by the Court when, after reviewing its use tax jurisprudence, it stated:

> In all the use tax cases, an individual faced with the choice of an instate or out-of-state purchase could make that choice *without regard to the tax consequences*. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax *of the same amount*. The taxes treated both transactions in the same manner.

Boston Stock Exchange, 429 U.S. at 332 [Emphasis added.] In the present case, Missouri's 1.5% additional use tax is unconsti-

tutional under this standard, by the parties own stipulations, in more than half the state. As such, it cannot stand.

A fair reading of the relevant cases, I believe, compels the conclusion that there is no de minimis exception to the Commerce Clause. The duty exacted by a state must be the same whether the goods subject to taxation originated instate or out-of-state — all of the time and in all of the state. Such a result is consistent with the view announced in *Quill Corp.* that "a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals." 112 S.Ct. at 1915.

Rather than draft a use tax that would conform to this bright-line, long-standing rule of constitutional law, the General Assembly made a rough "estimate" and assessed a flat 1.5% additional tax. The legislature's solution fails to ensure the equality required by the Commerce Clause.

With respect, I do not believe the constitutionality of Missouri's tax scheme here is even fairly debatable. This state's tax is simply unconstitutional.

/s/ Edward D. Robertson, Jr.
Chief Justice

APPENDIX B

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Case No. CV192-15CC

ASSOCIATED INDUSTRIES OF MISSOURI
and ALUMAX FOILS, INC.,
Plaintiffs,

v.

RAYMOND T. WAGNER, JR.,
DIRECTOR OF REVENUE,
Defendant,

and

DELONG'S INCORPORATED,
CITY OF BLUE SPRINGS, GARY MARKENSON,
MISSOURI MUNICIPAL LEAGUE, and ASSOCIATED
GENERAL CONTRACTORS OF MISSOURI,
Intervenor-Defendants.

JUDGMENT

This cause involves constitutional challenges asserted by Plaintiffs Associated Industries of Missouri and Alumax Foils, Inc., to the provisions of Section 144.748, RSMo. (Supp. 1991), which became effective on July 1, 1992. Section 144.748, RSMo. (Supp. 1991), provides for an additional one and one-half percent (1.5%) use tax for local purposes, said tax sometimes being referred to as the "Local Use Tax" or "Additional Use Tax." The 1.5% Additional Use Tax is in addition to the 4.225% use tax provided in Section 144.610, RSMo.

The Defendant Raymond T. Wagner is the Director of Revenue who, under Section 144.748, RSMo, (Supp. 1991), is charged with collecting the Additional Use Tax. The Court

permitted DeLong's, Incorporated, the City of Blue Springs, Gary Markenson, the Missouri Association of Counties, the Missouri Municipal League and the Associated General Contractors of Missouri to intervene as Intervenor-Defendants.

Plaintiffs' principal challenge to the Additional Use Tax is predicated upon the Commerce Clause of Article I, Section 8, of the United States Constitution. Plaintiffs also assert that the Additional Use Tax violates the Equal Protection, Due Process and Uniformity Clauses of the Missouri Constitution, Article I, Sections 2 and 10, and Article X, Section 3, respectively, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs also allege that Section 144.748, RSMo. (Supp. 1991), violates Sections 1, 10(a), 16 and 22 of Article X and Section 28 of Article IV of the Missouri Constitution.

The Federal Commerce Clause challenge is predicated upon the assertion that because the aggregate rate of local sales taxes in some locales in Missouri is less than 1.5%, the 1.5% Local Use Tax constitutes an unconstitutional burden upon interstate commerce. The lesser aggregate local sales tax in some locales when compared with the 1.5% Local Use Tax is also the basis for certain of the other assertions of unconstitutionality made by the Plaintiffs. Defendants and the Intervenor-Defendants assert that the Additional Use Tax is constitutional, and Intervenor-Defendants alternatively assert that the Additional Use Tax should be upheld in locales where the aggregate local sales tax rate is 1.5% or more.

Prior to the trial of this cause on June 24, 1992, the Plaintiffs had filed their Motion for Summary Judgment. Affidavits and counter-affidavits were filed, and the Court heard oral arguments with respect to the Motion for Summary Judgment on June 5, 1992. Thereafter, further written suggestions were filed. The Court then entered its order that the Motion for Summary Judgment would be taken with the case.

At the trial of this case on June 24 the parties appeared by their respective counsel. An extensive Stipulation of Facts was filed, in which all parties joined. Further matters were stipulated to on the record by counsel, and by agreement depositions which had been taken in this case were made a part of the trial record. The Court also heard testimony from the chief executive officer of DeLong's, Incorporated. Subsequent to the trial, the respective parties filed post-trial suggestions.

The Court has carefully considered the record herein and the extensive memoranda of law which have been provided by counsel for the parties. After such consideration, the Court finds the issues in favor of the Defendant and the Intervenor-Defendants and against the Plaintiffs.

While the Court does not believe it necessary to discuss all of the issues, it is appropriate to note briefly some of the considerations which the Court believes to be particularly pertinent. From the data in the Fiscal Note (Exhibit H to the Stipulation of Facts) for Section 144.748 RSMo. (Supp. 1991), with respect to sales subject to use tax in fiscal year 1989, it appears that had the Additional Use Tax been in effect in that fiscal year the additional 1.5% tax rate would have generated $48,142,904.43 in revenues. The Fiscal Note projects revenues of $58,518,001 from the Additional Use Tax in fiscal year 1993.

While there are some sales in Missouri that are not subject to a local sales tax and still other sales that are subject to a local sales tax of less than 1.5%, the evidence indicates that in calendar year 1990, 92.14% of the sales in Missouri which are subject to sales taxes were subject to an aggregate local sales tax rate of 1.5% or more. 55.32% of the sales in Missouri in calendar year 1990 were subject to an aggregate local sales tax rate in excess of 1.5%, with the local aggregate rates going as high as 3.5%. The record herein reflects that for calendar year 1990, intrastate sales in Missouri were subject to a local sales tax burden of approxi-

mately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales.[1]

The evidence also indicates, and the Court finds, that the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748, RSMo. (Supp. 1991), remains in effect. This is supported by Exhibits I and J to the Stipulation. It is also supported by the fact that the revenue generated by the Local Use Tax is distributed to local jurisdictions in proportion to the amount of local sales tax revenues they receive, which provides an affirmative incentive to maintain or increase their local sales tax rates.

The Court therefore specifically finds that the Additional Use Tax is not discriminatory *vis-a-vis* local sales taxes and that the Additional Use Tax does not constitute a burden upon interstate

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[1] Exhibit E to the Stipulation of Facts is a computer run from the Department of Revenue reflecting for calendar year 1990 the sales subject to sales taxes on a locale by locale basis across Missouri. Exhibit E also reflects the aggregate local sales tax rates for each locale in 1992. In calendar year 1990 there were $35,663,398,847.22 of total sales subject to Missouri sales taxes. Exhibit E demonstrates that if the 1992 aggregate local sales tax rates are applied on a locale by locale basis to the sales in each locale, such would generate $645,869,767.55 in local sales taxes. If a uniform 1.5% local sales tax rate is applied across the board to all 1990 sales subject to Missouri sales tax, such would generate local sales taxes in the amount of $534,950,982.71. From an examination of Exhibits I and 8, it is apparent that the changes in local sales taxes between 1990 and 1992 have been minimal, with there being some net increases. A recalculation of the data on Exhibit E using the actual local sales tax rates in effect in 1990 would result in a slightly lesser amount of actual local sales taxes than the $645,869,767.55 above indicated. The Fiscal Note (Exhibit H) for Section 144.748, RSMo. (Supp. 1991), indicates that for *fiscal* year 1989, there were local sales tax collections of $653,364,663. It is apparent to the Court, and the Court so finds and concludes, that intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales.

commerce. The Court further specifically finds an absence of any intent by the General Assembly in enacting Section 144.748, RSMo. (Supp. 1991), to discriminate against interstate commerce, and the Court further finds that there was an intent to create an equitable and workable system. The Court believes that this case falls within the rationale of *General American Tank Car Corporation v. Day*, 270 U.S. 367 (1926). Neither the United States Constitution nor the Missouri Constitution require mathematical exactness in the operation of these taxes. The Court concludes that Section 144.748, RSMo. (Supp. 1991), passes the four part test set forth in *Complete Auto Transit. Inc. v. Brady*, 430 U.S. 274 (1977).

The Court believes that the application and operation of the Local Use Tax and the local sales taxes must and should be considered, and that the constitutionality of the Local Use Tax cannot be ruled by facial considerations alone.

The Court concludes, after considering the record and legal memoranda submitted, that all of the constitutional challenges of the Plaintiffs must fail.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

1. The Plaintiffs' Motion for Summary Judgment be and the same is hereby overruled.

2. The provisions of Section 144.748, RSMo. (Supp. 1991), which became effective on July 1, 1992, do not violate the provisions of Section 8 of Article I or the Fourteenth Amendment of the United States Constitution nor do they violate the provisions of Section 2 or 10 of Article I, Sections 1, 3, 10(a), 16 or 22 of Article X, or Section 28 of Article IV of the Missouri Constitution.

3. The Plaintiffs are denied relief upon their Petition, including both the declaratory and injunctive relief sought therein.

4. Costs are taxed to Plaintiffs.

/s/ James F. McHenry
Circuit Judge

Dated: July 15, 1992